

## Little, Shauna

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**From:** Bandrowicz, Toni  
**Sent:** Tuesday, March 24, 2020 6:49 AM  
**To:** Little, Shauna; Cassandra Britton; Britton, Cassandra  
**Subject:** FW: U.S. District Court grants Exxon's motion to stay CWA/RCRA citizen suit until R1 reissues Exxon's industrial stormwater permit in Oct 2021

fyi

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**From:** Bukhari, Samir <Bukhari.Samir@epa.gov>  
**Sent:** Monday, March 23, 2020 4:19 PM  
**To:** Smith, Catherine <smith.catherine@epa.gov>  
**Cc:** Williamson, Timothy <Williamson.Tim@epa.gov>; Bandrowicz, Toni <bandrowicz.toni@epa.gov>; Curley, Michael <Curley.Michael@epa.gov>; George, Aleksandra <George.Aleksandra@epa.gov>  
**Subject:** RE: U.S. District Court grants Exxon's motion to stay CWA/RCRA citizen suit until R1 reissues Exxon's industrial stormwater permit in Oct 2021

Thank you Catherine. I am also copying Mike, Toni and Sasha on this.

Hope everyone is well.

Samir

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**From:** Smith, Catherine <[smith.catherine@epa.gov](mailto:smith.catherine@epa.gov)>  
**Sent:** Monday, March 23, 2020 4:08 PM  
**To:** Bukhari, Samir <[Bukhari.Samir@epa.gov](mailto:Bukhari.Samir@epa.gov)>  
**Cc:** Williamson, Timothy <[Williamson.Tim@epa.gov](mailto:Williamson.Tim@epa.gov)>  
**Subject:** FW: U.S. District Court grants Exxon's motion to stay CWA/RCRA citizen suit until R1 reissues Exxon's industrial stormwater permit in Oct 2021

Ex. 5 - Att'y-Client; Delib. Process



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**From:** Williamson, Timothy <[Williamson.Tim@epa.gov](mailto:Williamson.Tim@epa.gov)>

**Sent:** Monday, March 23, 2020 3:23 PM

**To:** R1\_ORC\_Regional\_Counsel\_ALL\_SG <[R1\\_ORC\\_Regional\\_Counsel\\_ALL@epa.gov](mailto:R1_ORC_Regional_Counsel_ALL@epa.gov)>

**Cc:** Ford, Peter <[Ford.Peter@epa.gov](mailto:Ford.Peter@epa.gov)>

**Subject:** FW: U.S. District Court grants Exxon's motion to stay CWA/RCRA citizen suit until R1 reissues Exxon's industrial stormwater permit in Oct 2021

Dear ORC,

Below is a tidy summary from our friend in OGC, Pete Ford, of the attached decision, which explores the intersection of judicial review and administrative decision-making under the doctrine of “primary jurisdiction.” It’s an interesting case for ad law junkies, which we all must needs be on some level. Many thanks to Samir for guiding the Region through this thicket when we were compelled to appear in this case.

Best, Tim

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**From:** Ford, Peter <[Ford.Peter@epa.gov](mailto:Ford.Peter@epa.gov)>

**Sent:** Monday, March 23, 2020 3:04 PM

**To:** Ross, David P <[ross.davidp@epa.gov](mailto:ross.davidp@epa.gov)>; Wildeman, Anna <[wildeman.anna@epa.gov](mailto:wildeman.anna@epa.gov)>; Sawyers, Andrew <[Sawyers.Andrew@epa.gov](mailto:Sawyers.Andrew@epa.gov)>; Gutierrez, Sally <[Gutierrez.Sally@epa.gov](mailto:Gutierrez.Sally@epa.gov)>; Kloss, Christopher <[Kloss.Christopher@epa.gov](mailto:Kloss.Christopher@epa.gov)>; Urban, Rachel <[Urban.Rachel@epa.gov](mailto:Urban.Rachel@epa.gov)>; Halter, Emily <[Halter.Emily@epa.gov](mailto:Halter.Emily@epa.gov)>; Fotouhi, David <[Fotouhi.David@epa.gov](mailto:Fotouhi.David@epa.gov)>; Leopold, Matt (OGC) <[Leopold.Matt@epa.gov](mailto:Leopold.Matt@epa.gov)>; Albright, Scott <[Albright.Scott@epa.gov](mailto:Albright.Scott@epa.gov)>; Youngblood, Charlotte <[Youngblood.Charlotte@epa.gov](mailto:Youngblood.Charlotte@epa.gov)>; Lewis, Evan <[lewis.evan@epa.gov](mailto:lewis.evan@epa.gov)>; DeRobertis, Cecilia <[DeRobertis.Cecilia@epa.gov](mailto:DeRobertis.Cecilia@epa.gov)>; Michaud, John <[Michaud.John@epa.gov](mailto:Michaud.John@epa.gov)>;

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Cc: OGC WLO <[OGC\\_WLO@epa.gov](mailto:OGC_WLO@epa.gov)>; Bukhari, Samir <[Bukhari.Samir@epa.gov](mailto:Bukhari.Samir@epa.gov)>; Kopf, Jeff <[Kopf.Jeff@epa.gov](mailto:Kopf.Jeff@epa.gov)>;

Dierker, Carl <[Dierker.Carl@epa.gov](mailto:Dierker.Carl@epa.gov)>; Williamson, Timothy <[Williamson.Tim@epa.gov](mailto:Williamson.Tim@epa.gov)>

**Subject:** U.S. District Court grants Exxon's motion to stay CWA/RCRA citizen suit until R1 reissues Exxon's industrial stormwater permit in Oct 2021

## Summary of the Order

On March 21, 2020, the U.S. District Court for the District of Massachusetts granted Exxon's motion to stay Conservation Law Foundation's (CLF) CWA/RCRA citizen suit under the doctrine of primary jurisdiction until Oct 2021, which is when R1 expects to reissue Exxon's Everett, MA terminal individual NPDES permit. *Conservation Law Foundation v. ExxonMobil Corp., et al.*, Case No. 1:16-cv-11950 (MLW) (D. Mass). The court's order provides that if R1 has not reissued the permit by Nov 1, 2021, the parties shall confer and report, jointly if possible, on the status of the permitting process and their views on whether the stay should be lifted. (EPA is not a party to this case, but was recently asked to testify as when it expects to reissue Exxon's permit, which expired in 2014. Exxon also asked EPA to intervene on its behalf earlier in the case, but EPA declined.)

## What the Parties Argued

CLF had argued that Exxon was in violation of its individual NPDES permit because it has not developed its Stormwater Pollution Prevention Plan (SWPPP) in accordance with "good engineering practices." This is because, CLF alleged, Exxon's SWPPP was not designed to deal with sea level rise, flooding, and other severe weather events associated with climate change. And because of these factors, CLF argued, the terminal also presents an imminent and substantial endangerment under RCRA. Exxon acknowledged the existence of climate change but argued that these issues are scientific and technical in nature, and thus the court should defer to EPA under the doctrine of primary jurisdiction to address these issues when the Agency reissues Exxon's NPDES permit.

## Primary Jurisdiction

The court's order explains that the doctrine of primary jurisdiction allows a court to stay claims "that contain some issue within the special competence of an administrative agency." Order at 19 (quoting *Reiter v. Cooper*, 507 U.S. 258, 268 (1993)). It provides that the First Circuit has identified four factors for courts to consider when determining whether to apply the doctrine of primary jurisdiction, which must be weighed against the risk of delay by waiting for the administrative agency. Those four factors are (1) "whether the agency determination lies at the heart of the task assigned the agency by Congress," (2) "whether agency expertise is required to unravel intricate, technical facts," (3) "whether ... the agency determination would materially aid the court," and (4) "whether the agency determination will serve the interest of national uniformity in regulation." *Id.* at 8 (quoting *Massachusetts v. Blackstone Valley Electric Co.*, 67 F.3d 981 (1<sup>st</sup> Cir. 1995)). If the factors weigh in favor of a stay, they "must be balanced against the potential for delay inherent in the decision to refer an issue to an administrative agency." *Id.*

## The Court's Decision

After finding that the doctrine of primary jurisdiction applies to CWA and RCRA citizen suits (*id.* at 19-24), the court held that (1) determining permit conditions is at the heart of the EPA's authority under the CWA, (2) how Exxon must consider predictable weather patterns – including flooding and severe storms caused by climate change – raises scientific and policy issues that EPA is better equipped to decide than the court, (3) EPA's renewal of the permit may render CLF's request for injunctive relief moot, and (4) resolving this case on the merits would take at least as long as EPA predicts it will take to renew the permit. *Id.* at 24-35. Finally, the court found that the potential for delay in deferring to EPA's reissuance timetable (expected Oct 2021) did not outweigh these four factors. *Id.* at 35-37.

The court's order provides that if R1 has not reissued the permit by Nov 1, 2021, the parties shall confer and report, jointly if possible, on the status of the permitting process and their views on whether the stay should be lifted.

If you have any questions, please contact OGC's Pete Ford (202.564.5593) or R1 ORC's Samir Bukhari (617.918.1095).

Peter Z. Ford  
U.S. EPA Office of General Counsel  
202.564.5593